

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-1219

To be argued by
RICHARD G. CHOSID

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

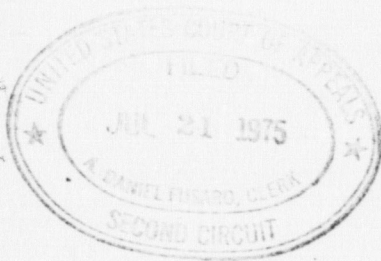
JOHN P. BOMMARITO,

Appellant.

Docket No. 75-1219.

APPENDIX FOR APPELLANT
JOHN P. BOMMARITO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



RICHARD G. CHOSID & ASSOCIATES
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Attorneys for Appellant
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West Bloomfield, Michigan 48033
TEL: (313) 851-9660.

PAGINATION AS IN ORIGINAL COPY

DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

VS.

Defendants.

No. 74 CRIM. 776

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)

Plaintiff)

-vs-)

JAMES CLAUDE WALLS,)

DANIEL A. STRATTON, *STRATON*)

John William BILLY GANN,)

JOHN PAUL BOMMARITO,)

LOUIS RUBIO,)

Rosemarie ROSE RUBIO,)

REX McFARLAND, *McFarlin*)

JOHN MARSHALL,)

SANDY HATFIELD and)

MIKE REEVES,)

Defendants)

Cr. No. 74-213

Violation: 21 USC 841(a)(1)
21 USC 846

I N D I C T M E N T

FILED

Rex B. Hawks
U.S. DISTRICT

The Grand Jury charges:

COUNT 1

That within the five years past, in the Western
Judicial District of Oklahoma, and within the jurisdiction
of this court, JAMES CLAUDE WALLS, DANIEL A. STRATTON, *John William*
GANN, JOHN PAUL BOMMARITO, LOUIS RUBIO, *Rosemarie* ROSE RUBIO, REX
McFarlin McFARLAND, JOHN MARSHALL, SANDY HATFIELD, and MIKE REEVES,
the defendants herein, unlawfully, knowingly, and willfully
conspired, combined, confederated and agreed, together, and
with John M. Herron, Jr., named herein as a co-conspirator
but not as a defendant, and with other persons to the Grand
Jury known and unknown, to violate the Controlled Substances

Act, Title 21, United States Code, Section 801, et seq., in that they conspired, combined and agreed to distribute controlled substances as listed in Schedule II of the Controlled Substances Act, to-wit: Cocaine and Methamphetamine.

The said conspiracy was in operation or execution from about February, 1974, and continuing thereafter to on or about the date of the return of this indictment, and was substantially as follows:

From time to time, one or more of the defendants would acquire quantities of cocaine or methamphetamine from co-conspirators and thereafter transport and deliver the acquired controlled substances to one or more of the defendants in the Western District of Oklahoma.

It was a further part of said conspiracy that one or more of the defendants would, upon receipt of the controlled substances, package and prepare for sale quantities of the controlled substances.

It was a further part of said conspiracy that one or more of the defendants would arrange to distribute the aforementioned controlled substances to persons within the Western District of Oklahoma.

Pursuant to said unlawful combination, confederation and conspiracy, the following overt acts were committed for the purpose of carrying out said unlawful conspiracy.

OVERT ACTS

1. On or about February, 1974, John Paul Bommarito delivered approximately 3 pounds of methamphetamine to James Claude Walls and Daniel A. Stratton at Oklahoma City, Oklahoma.

2. In March, 1974, James Claude Walls delivered

approximately one pound of methamphetamine to Rex McFarland at Norman, Oklahoma.

3. In March, 1974, at Norman, Oklahoma, James Claude Walls, Rex ^{McFarlin} McFarland and John Marshall met and discussed the quality of methamphetamine previously delivered to Rex ^{McFarlin} McFarland.

4. On or about March 26, 1974, James Claude Walls delivered 28.8 grams of methamphetamine and 5.53 grams of cocaine to John M. Herron, Jr., at Norman, Oklahoma.

5. On or about April 1, 1974, James Claude Walls accepted \$1,200.00 from John M. Herron, Jr., in payment for those drugs delivered to Herron by Walls as described in Overt Act #4.

6. On or about April 12, 1974, John M. Herron, Jr., in a telephone conversation with James Claude Walls, ordered a quantity of cocaine.

7. On or about April 12, 1974, at Norman, Oklahoma, Louis Rubio and Rose Rubio delivered 20.4 grams of cocaine to John M. Herron, Jr.

8. On or about April 12, 1974, at Norman, Oklahoma, and prior to the delivery of the cocaine described in Overt Act #7, Sandy Hatfield appeared at the apartment of John M. Herron, Jr.

9. On or about April 18, 1974, at Norman, Oklahoma, John M. Herron, Jr., ordered a quantity of methamphetamine from Daniel A. Stratton.

10. On or about April 18, 1974, at Norman, Oklahoma, John M. Herron, Jr., discussed the order of methamphetamine described in Overt Act #8, with James Claude Walls.

11. On or about April 18, 1974, at Norman, Oklahoma,

John Miller
~~Billy~~

Gann delivered 231 grams of methamphetamine to John M. Herron, Jr.

12. On or about April 18, 1974, at Norman, Oklahoma, and prior to delivery of the methamphetamine described in Overt Act #11, Mike Reeves appeared at the apartment of John M. Herron, Jr.

13. On or about May 30, 1974, at Norman, Oklahoma, James Claude Walls delivered 27.45 grams of cocaine to John M. Herron, Jr.

14. On or about June 1, 1974, John M. Herron, Jr., in a telephone conversation with James Claude Walls, discussed the method by which Herron would pay Walls for the cocaine delivered to Herron by Walls.

15. On or about June 3, 1974, a \$550.00 payment was wired to *John Miller* ~~Billy~~ Gann at Norman, Oklahoma.

16. On or about June 21, 1974, at Oklahoma City, Oklahoma, Daniel A. Stratton accepted payment of \$550.00 from John M. Herron, Jr., as final payment for cocaine delivered to Herron by Walls as described in Overt Act #13.

All in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

COUNT 2

That on or about the 26th day of March, 1974, in the Western Judicial District of Oklahoma,

----- JAMES CLAUDE WALLS -----

did knowingly, willfully and unlawfully distribute to one John M. Herron, Jr., approximately 28.8 grams of methamphetamine and 5.53 grams of cocaine, Schedule II controlled substances, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT 3

That on or about the 12th day of April, 1974, in the Western Judicial District of Oklahoma,

----- JAMES CLAUDE WALLS,
LOUIS RUBIO, and
Rosemarie ~~ROSE~~ RUBIO -----

did knowingly, willfully and unlawfully distribute to John M. Herron, Jr., approximately 20.4 grams of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT 4

That on or about the 18th day of April, 1974, in the Western Judicial District of Oklahoma,

----- DANIEL A. STRATTON,
JAMES CLAUDE WALLS, and
John William ~~BILLY~~ GANN -----

did knowingly, willfully and unlawfully distribute to John M. Herron, Jr., approximately 231 grams of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL:

B. B. Olson
FOREMAN OF THE GRAND JURY

WILLIAM R. BURKETT
United States Attorney

O. B. Johnston III
O. B. JOHNSTON III
Assistant U. S. Attorney

ATTEST: A true copy of the original

Rex B. Hawks, Clerk

R. B. Hawks
Deputy

RE: 173

SECOND COUNT

The Grand Jury further charges:

On or about the 8th day of March, 1974,
in the Southern District of New York,

JOHN P. DOMMARITO and
HERBERT WOLF,

the defendants, unlawfully, intentionally and knowingly
did distribute and possess with intent to distribute a
Schedule II controlled substance, to wit,
approximately 199.0 grams of methamphetamine hydrochloride.

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(B).)

(S) James W. Lester
Foreman

(S) Paul J. Curran
PAUL J. CURRAN
United States Attorney

A TRUE COPY
RAYMOND P. BURGHARDT, Clerk

By (S) [Signature]
Deputy Clerk

CROSS-EXAMINATION OF LOUIS CIRACO
BY RICHARD CHOSID

(149) Q: In essence you were satisfied with having found a contact where you could buy some narcotics, is that true?

A: Yes.

Q: So what you did in New York was your own business, isn't that true, so long as you paid for the narcotics?

A: So long as I paid for it, yes.

Q: Mr. Bommarito wasn't going to participate with you in any way in anything that you did in New York, was he?

A: Not to my knowledge.

(154) Q: Was there anything more to your relationship with Mr. Bommarito than that of a buyer and seller, you being the buyer and Mr. Bommarito being the seller?

THE COURT: I sustain the objection as to form.

(155 & 156) THE COURT: I will permit what he thought. I don't see this has a great deal of weight, but I will give it such weight as is appropriate.

MR. DAVIS: The facts speak for themselves as to the relationships.

THE COURT: Overruled.

A: Buyer and seller relation.

THE COURT: That is what you thought?

THE WITNESS: Yes.

DIRECT EXAMINATION OF LOUIS CIRACO
BY RICHARD CHOSID

(247) Q: Did you tell Mr. Bommarito that you were going to distribute or sell the amphetamine that you got from

him any place in the country?

A: I can't recall the exact discussion. I know I told him I would sell in New York and anywhere else.

Q: Was there any restriction on where you could sell anything that you got from Mr. Bommarito as a result of your conversation with Mr. Bommarito?

THE COURT: Did you discuss any restriction, is that what you are saying?

MR. DAVIS: By whom?

THE COURT: Mr. Bommarito.

MR. CHOSID: That is correct.

A: No, there was no restriction.

(248 & 249) Q: You told him. Was this a condition upon your receipt of anything from Mr. Bommarito? Did Mr. Bommarito say to you -- let me rephrase the question.

Did Mr. Bommarito say to you that he would give to you or sell to you the amphetamine if you took it to New York?

A: No.

Q: Did you tell Mr. Seidel this morning there was no agreement between you and Mr. Bommarito regarding your taking the amphetamine to New York?

A: There was no agreement as far as where I was taking it to. I could have taken it to Alaska if I wanted to.

(63) A: I called him just to keep in contact and try to explain why I hadn't talked to him in such a long time. I gave him a story.

And that I told him that Tony Senneca, the agent, wanted to still do a deal and at that time he asked me if I had an apartment or telephone he could reach me at. I said "No, I am getting a number." We ended the conversation with Bommarito asking -- telling me when I get a number to call and let him know.

DIRECT EXAMINATION OF AGENT SENNECA
BY MR. DAVIS

(185) A: He looked at the license, gave it back to me and then asked me what my business was, what I wanted to do.

I told him I could handle large quantities of speed, meaning methamphetamine.

.....

A: I told him I could handle large quantities of speed. He asked me what I wanted to do. I asked him in turn what kind of quantities he could supply and what his prices were.

GOVERNMENT'S CLOSING ARGUMENT

(297, et seq) Contrary to what might have been implied in the argument of Mr. Bommarito, this was not a single transaction. A transaction of distribution did occur in Miami. That was followed by a number of phone calls between the Miami area and New York. A number of those calls according to Mr. Ciraco were instituted by Mr. Bommarito and the substance of those phone calls as it came out from the witness was asking how is it going, what is going on, have you sold the stuff yet? This was not a simple buy-sell.

.....

More particularly, from this piece of evidence the following conversation: "Ciraco: Right. I have the four grand, you know.

"Bommarito: When can we do the scam?

"Ciraco: Oh--

"Bommarito: Can you do it Monday, the scam?"

The Government submits that on this alone we have the clearest possible evidence of a continuing agreement to deal in drugs. In addition to this, we also have the fact which evidently was ignored in the defense summation, there is the whole Detroit aspect of the proof in this case.

In Detroit, Mr. Ciraco and Mr. Bommarito meet in

Detroit and talk about further sales of drugs. Now, Mr. Ciraco at that point was not a co-conspirator since he by that point was acting for the Government. But we have the clearest possible indication that Mr. Bommarito intended his meeting and association with Mr. Ciraco to be one for a continuing sale and distribution of drugs.

This shows up in some of the further tapes when Mr. Bommarito proposes this notion of calling the station and leaving a message, all of this smacks of conspiracy, of an agreement.

ARGUMENT BY RICHARD CHOSID

(233 & 234) MR. CHOSID: Your Honor, as to Count 2, it is the contention of the defendant that up to and including the time that -- the date we came here and the date we started this trial, we are concerned about our ability to prove our whereabouts on a particular day that allegation was said to have occurred in the Southern District of New York, because nowhere in that indictment were we advised in any manner, way or form that in fact, Mr. Bommarito was an aider and an abetter in connection with the substantive offense.

Furthermore, nothing in the indictment that informs us that any delivery had taken place as far as Count 2 is concerned or just what the facts and circumstances surrounding this alleged possession in this District by Mr. Ciraco, Bommarito and Mr. Wolf constituted.

United States of America

Southern District of New York

ss.

I, JOHN LIVINGSTON, Clerk of the United States
District of New York, do hereby certify that the writ

To wit: Xerox copy of Docket Sheets., 74 Civ. 8th, 1974., U.S.A. -vs- JOHN P. BONMARITO AND
in this court.*****

have been compared with their originals on file at
office; that they are correct transcripts therefrom
originals.

IN TESTIMONY WHEREOF

my name and affixed the seal of the
City of New York, in
York, this 15th
in the year of our Lord
and seventy-five
the United States the 6

Raymond

United States of America

Southern District of New York

ss.

I, JOHN LIVINGSTON, Clerk of the United States District Court for the Southern District of New York, do hereby certify that the writings annexed to this certificate

To wit: Xerox copy of Docket Sheets., 74 Crim 776., filed August 8th, 1974., U.S.A. -vs- JOHN P. BONMARITO AND HERBERT W. I., filed in this court.*****

have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 15th day of July in the year of our Lord one thousand nine hundred and seventy-five and of the Independence of the United States the ~~One Hundred and~~ TWO HUNDRETH.

Raymond F. Buehlert, Clerk.

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
10-7-74	Both defts. no appearance. Court directs entry of not guilty. Case assigned to Judge Owen for all purposes. MacMahon, J.		
10-11-74	Filed Deft's. affidavit and notice of motion for discovery and inspection and for a bill of particulars.		
10-17-74	HERBERT WOLFF-Filed the following papers received from the Southern District of Florida. Case #74-123 O/R. Order of removal Waiver of removal hearing Warrant for Arrest, S.D.N.Y. True Copy of Indictment, S.D.N.Y. Appearance Bond in the sum of \$5,000 P.R.B.		
10-29-74	JOHN BOMMARITO-Filed the following papers received from Magistrate Raby (Mag. #74-1259) Docket Entry Sheet Copy of Indictment Disposition Sheet Notice of appearance.		
11-8-74	Both defts. present (with attorneys) for pre-trial conference. Deft. Bommarito pleads not guilty. Bail continued at \$15,000 cash. Deft. Wolf enters plea of not guilty. Bail continued at \$5,000 P.R.B. Trial date set for Jan. 13, 1975 at 10:00 A.M. Owen, J.		
1-23-75	BOTH DEFTS.-Filed Govt's. notice of readiness for trial on or after 1-23-75.		
3-3-75	JOHN P. BOMMARITO-Filed deft's. affidavit & notice of motion to dismiss the indictment, ret 3-3-75.		
3-3-75	JOHN P. BOMMARITO-Filed deft's. brief in support of motion to dismiss the indictment.		
3-3-75	JOHN P. BOMMARITO & HERBERT WOLF-Filed defts'. affidavit & notice of motion to adjourn the trial, ret. 3-3-75.		
3-3-75	JOHN P. BOMMARITO & HERBERT WOLF-Filed defts'. brief in support of motion for adjournment.		

DATE	PROCEEDINGS
3-3-75	Filed Second Offender Information. as to deft. Bommarito.
3-5-75	HERBERT WOLFF-Filed Waiver of Trial by Jury - Approved.....Owen,J.
3-5-75	JOHN PAUL BOMMARITO-Filed Waiver of Trial by Jury - Approved.....Owen,J.
3-7-75	JOHN PAUL BOMMARITO-Filed Govt's. memorandum of law in opposition to deft's. motion to dismiss the indictment on grounds of double jeopardy.
3-3-75	Trial adjourned until Mar 4, 1975 at 2:00 P.M. Both sides agree to try this case non jury.....Owen,J.
3-4-75	Stipulation of Jury signed & filed. Case proceeds to trial for both defts. without jury.
3-5-75	Trial continued. Deft. Wolfe motion to dismiss count 2 of indictment is granted.
3-6-75	Trial continued & concluded. Court finds deft. Wolfe not guilty. Court finds deft. Bommarito guilty on both counts. Pre-sentence investigation ordered. Bail continued. Sentence for Apr. 25th at 2:15 P.M.....Owen,J.
3-26-75	Filed transcript of record of proceedings dated March 4,5,6, 1975.
4-22-75	JOHN PAUL BOMMARITO-Filed Govt's. sentencing memorandum.
4-21-75	JOHN PAUL BOMMARITO-Filed Govt's. affidavit for a writ of habeas corpus directed to U.S. Marshal Eastern District of Michigan. Writ issued, ret. 5-2-75.
4 30 75	JOHN PAUL BOMMARITO Deft sentencing adjourned until May 19th @2:15p.m. Owen J.
5-19-75	Deft. Bommarito admits to 2nd offender information & issentenced,....Owen,J.
5-19-75	JOHN P. BOMMARITO-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS on EACH of Counts 1 and 2, to run CONCURRENTLY with each other and to COMMENCE with and run CONCURRENTLY with any sentence imposed in the District of Michigan. Pursuant to Provisions of Title 21, Section 841, U.S. Code, the deft. is placed on SPECIAL PAROLE for a term of FOUR (4) YEARS, on each of Counts 1 and 2, to run CONCURRENTLY with each other and to commence upon the expiration of his confinement. Bail is revoked. Deft. is remanded. The foregoing sentence is in no way based upon the fact that the deft. is a second offender.....Owen,J. Issued commitment 5-20-75.
5-27-75	JOHN PAUL BOMMARITO-Filed writ of habeas corpus with marshal's return. Writ satisfied - 5-19-75.....Owen,J. Deft. Committed to FDH-NY for removal by Bureau of Prisons to FCI-Sandstone, Minn.
5-28-75	Filed transcript of record of proceedings dated 3-3-75.
5-30-75	JOHN P. BOMMARITO-Filed Deft's. notice of appeal from the final judgment entered in this action. Mailed notice to John P. Bommarito, 36857 Arlene, Sterling Heights, MI. and U.S. Attorney's Office.
5-29-75	JOHN P. BOMMARITO-Filed commitment & entered return. Deft. delivered to Warden, Federal Detention Headquarters, N.Y.C. on 5-19-75.

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DATE	PROCEEDINGS
6-20-75	JOHN P. BOMMARITO-Filed commitment & entered return. Deft. delivered to F.C.I., Sandstone, Minn. on 6-11-75.
6-24-75	JOHN P. BOMMARITO-Filed notice of certification & transmittal of the record on appeal to the U.S.C.A.

DATE	PROCEEDINGS
3-3-75	Filed Second Offender Information. as to deft. Bommarito.
3-5-75	HERBERT WOLFE-Filed Waiver of Trial by Jury - Approved.....Owen,J.
3-5-75	JOHN PAUL BOMMARITO-Filed Waiver of Trial by Jury - Approved.....Owen,J.
3-7-75	JOHN PAUL BOMMARITO-Filed Govt's. memorandum of law in opposition to deft's. motion to dismiss the indictment on grounds of double jeopardy.
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4 30 75	JOHN PAUL BOMMARITO Deft sentencing adjourned until May 19th @2:15p.m. Owen J.
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5-19-75	JOHN P. BOMMARITO-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS on EACH of Counts 1 and 2, to run CONCURRENTLY with each other and to COMMENCE with and run CONCURRENTLY with any sentence imposed in the District of Michigan. Pursuant to Provisions of Title 21, Section 841, U.S. Code, the deft. is placed on SPECIAL PAROLE for a term of FOUR (4) YEARS, on each of Counts 1 and 2, to run CONCURRENTLY with each other and to commence upon the expiration of his confinement. Bail is revoked. Deft. is remanded. The foregoing sentence is in no way based upon the fact that the deft. is a second offender.....Owen,J. Issued commitment 5-20-75.
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5-28-75	Filed transcript of record of proceedings dated 3-3-75.
5-30-75	JOHN P. BOMMARITO-Filed Deft's. notice of appeal from the final judgment entered in this action. Mailed notice to John P. Bommarito, 36857 Arlene, Sterling Heights, MI. and U.S. Attorney's Office.
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74 Cr. 776

74 Cr.

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DATE	PROCEEDINGS
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6-24-75	JOHN P. BOMMARITO-Filed notice of certification & transmittal of the record on appeal to the U.S.C.A.